BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANDREW L. WILLIAMS	)	
Claimant	)	
V.	)	
	)	
NOBILITY CONSTRUCTION, INC.	)	Docket No. 1,074,064
Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the May 12, 2016, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent. Darin M. Conklin of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ.

ISSUES

The parties agreed claimant was an employee of respondent and sustained a May 27, 2015, personal injury by accident arising out of and in the course of his employment.

Claimant alleges that at the time of his accident, respondent was required by the Kansas Workers Compensation Act (Act) to carry workers compensation insurance. Claimant asserts that under K.S.A. 44-505(a)(2), respondent is covered by the Act if it had a gross annual payroll of more than $20,000 in 2014 and reasonably expected to have a payroll of more than $20,000 in 2015. Claimant asserts certain individuals whom respondent contends were independent contractors were employees. According to claimant, if the payments made to those individuals are considered wages, then respondent meets the payroll requirements of K.S.A. 44-505(a)(2) to bring it under the Act.

Respondent and the Kansas Workers Compensation Fund (Fund) contend the workers alleged by claimant to be employees are, in fact, independent contractors. Respondent and the Fund also interpret K.S.A. 44-505(a)(2) to mean that respondent is subject to the Act only if it had a gross annual payroll of more than $20,000 in 2014 and reasonably expected to have a payroll of more than $20,000 in 2015.

In dicta, the ALJ found that in order for respondent not to be covered by the Act, under K.S.A. 44-505(a)(2), respondent must have had a total gross annual payroll of not more than $20,000 in the year preceding claimant's work accident and reasonably estimated its gross annual payroll for the current year of the accident to be not more than $20,000. The ALJ noted the foregoing issue was moot as claimant failed to prove either of the requirements contained in K.S.A. 44-505(a)(2). The ALJ concluded respondent did not have a gross annual payroll of more than $20,000 in 2014 and did not reasonably expect to have a payroll of more than $20,000 in 2015.

The issues are:

1. What are the requirements of K.S.A. 44-505(a)(2) to exclude an employer from the Act's jurisdiction?

2. In 2014, was respondent's gross annual payroll no more than $20,000?

3. In 2015, was respondent reasonably expected to have a gross annual payroll of no more than $20,000?

FINDINGS OF FACT

Claimant was injured on May 27, 2015, while working for respondent. The details of claimant's accident and medical treatment are not germane to this appeal and are not described herein.

Andrew Keehn (Keehn) testified he was the sole owner of respondent. Respondent primarily did roofing, but also did siding, gutters, decks and other work. Kansas Secretary of State records show respondent was incorporated in May 2013 and Gerald Keehn (Gerald), Keehn's father, as incorporator and resident agent. According to Keehn, Gerald had nothing to do with the business.

On April 12, 2015, Keehn sent an email to Pamela Lassen, his insurance agent, indicating he was shutting down respondent and not renewing his workers compensation insurance. However, respondent continued performing jobs during June 2015. On June 16, Keehn closed respondent's bank account and transferred the funds to a personal account.

Keehn confirmed claimant was respondent's employee. Claimant earned $10 per hour and worked 30 to 40 hours during the weeks he worked. Keehn denied that in return for working for respondent, claimant's rent was reduced. According to Keehn, he paid claimant with checks, not cash.

Keehn testified at his deposition that in 2014, his payroll was under $20,000 or really close to it. At the preliminary hearing, he estimated his 2014 payroll was around $8,000. He did not expect to have a payroll of more than $20,000 in 2015.

Keehn testified Jerris[1] Reed, Fred Taylor, Mario Munoz, Sheldon Woods, Billy Kelly and Mace Goslin were contractors. Respondent placed into the record financial documents, including bank records and payment summaries. In 2014, respondent's records showed it paid checks totaling $10,974.04 to employees, including claimant and Goslin. Contractors, excluding Goslin, were paid $9,638.40:[2]

Jerris Reed	$4,793.24	(11 checks)
Fred Taylor	$ 975.00	(3 checks)
Mario Munoz	$ 800.00	(1 check)
Sheldon Woods	$ 400.00	(1 check)
Bill Kelly	$2,670.16	(6 checks)
	$9,638.40	

According to Keehn, Reed, a roofer, provided his own tools. Initially, Reed was paid by the hour. However, after Reed acquired an air compressor, he was paid by the square. Keehn denied providing Reed a Form W-2. Keehn averred he did not tell Reed how to do his job, only to do it. Keehn indicated Reed actually worked for another person, not respondent. A 2014 Form 1099 was issued to Reed for $4,792.50.

Keehn testified that Kelly had the same status as Reed. According to Keehn, Kelly did not supervise any employees. Keehn testified Kelly provided his own tools, but acknowledged Kelly drove respondent's truck. Respondent issued Kelly a Form 1099 for 2014 for $2,770.50. Kelly completed a Form W-9 for respondent. Keehn indicated respondent paid Kelly by the piecework he performed and not $15 per hour. Kelly was paid expense checks totaling $160.

Keehn indicated Munoz served as a consultant on a flat roof project respondent undertook. A Form W-9 was completed by Munoz in 2014. According to Keehn, Woods worked as a welder on the flat roof project, provided his own welder and also completed a Form W-9.

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[1] The record indicates the spelling of this name is Jerris or Jarris.

[2] P.H. Trans., Resp. Ex. A.

According to Keehn, Taylor was a painter who also completed a Form W-9. Taylor provided his own rollers, but respondent provided a sprayer.

Keehn testified that Goslin worked on Gerald's house, but was issued a check by respondent. That was because Gerald was not available to pay Goslin. Respondent's records, however, listed Goslin as an employee. However, Keehn testified Goslin was an independent contractor who did some random drywall work. Respondent paid Goslin four checks totaling $705.92.

Keehn testified that all contractors "still have to do work under our standards. But as long as they fall under our standards then they are free to do what they want, how they want."[3] Keehn indicated he provided the contractors no training and the contractors worked in areas that respondent normally did not, such as plumbing and welding. The contractor could have someone else perform the work or assist them. If a contractor used an assistant, Keehn did not supervise them. Respondent did not set the contractors' hours, required no written reports, paid the contractors by the job and the price was set prior to the job commencing. Contractors were free to work for other entities.

According to Keehn, all checks respondent paid to Nick Baumgartner were for advertising with the Kansas Coyotes. Keehn denied respondent employed Alex Hernandez or used him as a contractor.

Keehn indicated Jeremiah Campbell was an independent contractor who worked for respondent from March through May 2015 and was paid in cash roughly $18 per hour. Campbell owned his own tools and did everything his own way. On one occasion, Gerald paid Campbell with a check. Keehn asserted Campbell was not being truthful when he testified he was respondent's employee. Respondent's 2014 and 2015 bank records do no show any checks written to Campbell.

Respondent's 2015 records show it paid checks totaling $175 in wages to Rach Wiley and Dary Child[4] and no payments to contractors. The records show no checks were paid to claimant, Campbell or to any individuals with the names Bill, Bob or Sam. Keehn indicated he paid workers with cash in 2015, but paid with checks in 2014.

Keehn indicated that prior to this claim, no one explained to him that only the wages of employees counted toward the $20,000 threshold. Respondent presented written contracts with Woods for $400 and Munoz for $800.

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[3] Andrew Keehn Depo. (Oct. 19, 2015) at 18.

[4] Respondent's 2015 records indicate this name may be Dary Child, Darcy Child or Darcy Childs.

Keehn indicated he did not pay the money he withheld from employees' wages for taxes to the State of Kansas and entered into an agreement with the Department of Labor or Revenue to repay the money. Neither the agreement nor records concerning the amounts withheld by respondent from employees' wages for federal and state income taxes, Social Security, Medicare or any other withholdings were placed into evidence. Respondent's quarterly wage reports and unemployment tax returns for the first and second quarters of 2014 were made part of the record. Respondent's quarterly wage reports and unemployment tax returns for 2015 and the last two quarters of 2014 were not placed in the record. Nor was respondent's 2014 income tax return placed in the record.

Gerald denied working on respondent's books and taxes or giving tax advice. He denied being respondent's corporate Secretary. He admitted signing paperwork with First Heritage Bank indicating he was respondent's Secretary so respondent could open a bank account. Gerald indicated the banker told him to sign the document to open the account. Gerald indicated the bank document was the only document he signed as Secretary of respondent. Gerald indicated that on December 29, 2014, paperwork was filed with the Kansas Secretary of State removing him as respondent's Secretary. He also signed paperwork closing the bank account, but he received none of the proceeds.

Gerald did not know what respondent's payroll was in 2014 or 2015. On occasion, he would give his son construction advice, but was never compensated.

Pamela Lassen works for Becker Lassen Insurance Agency and first sold Keehn workers compensation insurance for respondent in May 2014. Lassen stated she probably would have told Keehn that respondent needed workers compensation insurance if it had an annual payroll of $20,000. From an application completed by Keehn, Lassen understood respondent's anticipated payroll during the 12-month policy period would be $20,000 – $10,000 for roofers and $10,000 for employees installing guttering. Lassen was uncertain if Keehn told her he was going to use subcontractors. If Keehn had done so, Lassen would have told him to obtain certificates of insurance from each subcontractor showing they had workers compensation insurance.

Respondent's policy lapsed for nonpayment on December 30, 2014. The policy was reinstated on January 30, 2015, and ran through 12:01 a.m. on May 27, 2015. However, the policy again was canceled on April 18, 2015, for nonpayment of an audit fee that created an additional premium. On July 2, 2015, Lassen sent an email to Keehn indicating he did not comply with a requested audit, the audit was closed due to noncompliance, there was no change in premium and if he needed workers compensation coverage, the audit had to be completed.

Lassen testified that as of May 27, 2015, respondent had no motor vehicle insurance because it was canceled by Keehn and respondent's liability insurance had also lapsed.

Claimant, Reed, Kelly and Campbell testified at the preliminary hearing. As noted above, respondent considered Reed, Kelly and Campbell to be independent contractors. Campbell testified he worked for respondent from February through part of April 2015. He indicated he was given the option of being an independent contractor or an employee and he chose to be an employee. He had his own tools and did basic construction. Campbell reported to work at times instructed by Keehn.

Campbell indicated he completed a Form W-4[5] and tried to give it to Keehn, but was told he would get it later. No taxes were taken out of Campbell's wages. Initially, he worked two days a week, but later became full time. On some occasions, he worked over 40 hours a week, but was not paid overtime and received a flat $18 per hour. Campbell was paid cash except on April 20, when he was paid a $180 check from Gerald. The $180 was for work performed on Gerald's house and he was given the check by Keehn. Campbell testified he has never met Gerald. Campbell believed that when he worked on Gerald's house, he was working for Keehn, not Gerald. Campbell thought he was paid $2,000 to $3,000 by respondent. He also acknowledged he may have been paid $1,500.

Campbell indicated that when he worked for respondent, seven other people worked for respondent. They included claimant and individuals by the name of Bob, Reggie, Sam and Sam's younger brother. On one job, most of the seven other people worked with Campbell, but on most jobs he only worked with claimant. Campbell was placed in charge of other workers and told them what to do. He saw no contractors working for respondent. He quit because he did not get along with Keehn. About the time Campbell quit, he was told by Keehn that respondent had other jobs lined up.

Reed worked for respondent from June or July 2014 until almost Halloween. Reed was paid $15 per hour and he provided his own tools, including an air compressor and hose. He believed he was respondent's employee and completed several employment documents. Reed indicated he was told where to go and what to do. Reed was a roofer and oversaw the work to make sure it was done right. He considered Keehn to be part of respondent, but not Gerald. Most of the time, Reed was paid with a check, but sometimes with cash.

In June 2014, Reed worked from 24 to 26 hours per week up to 36 to 38 hours per week. At the end of 2014, Reed received a Form 1099 from respondent indicating he made $4,700. He thought he made double that amount.

When Reed started working for respondent, three or four other persons worked there. He was asked if he recalled working with several individuals. One of those

[5] Campbell indicated he completed a Form W-2, but as that is a form completed by the employer, he likely meant a Form W-4.

individuals was Nick Baumgartner. Reed indicated he did not recall working with Baumgartner.

Reed quit over various issues with respondent, including not being paid on time and the proper amount of taxes not being taken out of his wages. When Reed applied for unemployment benefits, respondent alleged he was a contractor. Reed indicated he ultimately received unemployment benefits.

Kelly indicated he worked for respondent in the summer of 2014 at the rate of $15 per hour and was in charge when Keehn was not there. He was paid every two weeks and received his first check in September. Kelly was paid by check and with cash and worked eight to ten hours a day. He made $800 to $1,500 every two weeks, depending on respondent's workload. He indicated respondent was busy. Kelly thought respondent was taking taxes from his wages. He believed he was respondent's employee. He drove respondent's truck and used respondent's tools, as well as his own hammer and tool belt. He would sign receipts on behalf of respondent. Kelly received no training from respondent. While working for respondent, Kelly worked for no one else. According to Kelly, Keehn was the boss.

Kelly indicated that he usually worked only with claimant, but also worked with Reed. Kelly met Gerald once, but did not know him. Kelly quit working for respondent in October 2014 because respondent did not have enough work to keep Kelly busy. At the time, respondent had no work lined up for November or December. Kelly testified he was a friend of claimant's and claimant needs compensation for his accident.

Claimant indicated he moved in with Keehn in "July or August"[6] and paid $250 per month for rent. Claimant began working for respondent two to three weeks after he moved in with Keehn, making $10 per hour. Claimant later acknowledged he received his first check from respondent in October 2014. He worked for respondent through November and for a few days in December. His rent and taxes were taken out of his paychecks. Claimant did not know how much he earned in 2014 and did not file a 2014 income tax return.

Claimant indicated that when he first started working for respondent, four other persons worked there – Reed, Kelly and two others. Claimant indicated that when he worked for respondent in 2015, other people working there included Campbell and individuals whose first names were Bill, Bob and Sam. Sam's cousin also worked with claimant. On the day he was injured, claimant worked with Bill and Bob while Keehn was away.

As indicated above, in January or February 2015, claimant returned to work for respondent. He worked approximately 20 hours per week in February, 30 hours per week

[6] P.H. Trans. at 104.

in March and 30 to 40 hours per week in April. However, in April he did not work for respondent for two to three weeks. He was paid with cash and his rent was paid. He testified that in 2015, he worked on jobs involving guttering, repairing a deck, painting, siding and installing drywall. Claimant's accident occurred when he was removing gutters. Claimant thought he was paid $4,000 in 2015, including his rent. At the time of his work injury, claimant intended to continue working for respondent.

Claimant indicated that at one point, Keehn talked about expanding his business and got new business cards and fliers. He also added a Facebook page in March or April, did Internet advertising and had a booth at a home show in February, March or April at the Kansas Expocentre. Claimant placed into evidence a page from the Internet from Bowser Multimedia dated July 29, 2015, which showed an advertisement for respondent. Claimant also introduced an Internet Groupon advertisement for new roof and handyman services. The Groupon advertisement had a link to respondent's website and contained two reviews of respondent's services.

Claimant testified that in May 2015, he was told by Keehn that business needed to pick up or the business would be ended. Claimant testified the job he was working on when he was injured was not complete. He indicated respondent had another job in progress and he was told by Keehn that he had future jobs lined up. Claimant thought the business was going to continue because business was picking up and they had a lot of work.

Claimant, while employed by respondent, worked "a lot"[7] on Gerald's house from February 2015 up to the date he sustained his work injury. At the time, claimant thought he was working for respondent, not Gerald.

After claimant was injured, he was told by Keehn that respondent's workers compensation insurance lapsed because he missed a payment. Keehn informed claimant he wanted to make payments on claimant's medical bills and gave claimant $100. Claimant contended that at that time, he was owed $200 in wages. After the conversation, claimant contacted an attorney.

The ALJ determined Woods, Munoz, Kelly and Goslin were independent contractors. The Preliminary Hearing Order noted Munoz was hired as a consultant, solely for his expertise on a flat roof project. Woods was found to be an independent contractor because he was a welder on a single project.

The ALJ concluded Goslin was a contractor even though he was listed as an employee in respondent's exhibit. The Preliminary Hearing Order indicated he performed drywall installation, owned his own business and worked only a short period of time.

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[7] *Id.* at 106.

Kelly was found to be a contractor by the ALJ. The ALJ questioned Kelly's credibility because he declared no income for 2014 and he signed a Form W-9. Kelly's testimony was cited as supportive of a finding that he was a contractor, not an employee.

The Preliminary Hearing Order was silent as to whether Reed and Taylor were employees or contractors.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[9]

K.S.A. 2014 Supp. 44-501b(a) provides:

> It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

K.S.A. 44-505(a), in part, states:

> Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
>
> . . .
>
> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection[.]

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[8] K.S.A. 2014 Supp. 44-501b(c).

[9] K.S.A. 2014 Supp. 44-508(h).

The parties devoted an extensive portion of their briefs to the ALJ's interpretation of K.S.A. 44-505(a)(2). Therefore, this Board Member will address this as an issue on appeal.

In *Bergstrom*,[10] the Kansas Supreme Court held:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The plain and unambiguous meaning of K.S.A. 44-505(a)(2) is that in order for an employer to come under the jurisdiction of the Act, it must have a gross annual payroll of more than $20,000 for the calendar year preceding the work injury and the current year of said injury. In *Haney*,[11] the Kansas Court of Appeals stated, "The Act clearly requires the employer to have a total gross annual payroll of greater than $20,000 for the preceding calendar year and the current year of the accident. [K.S.A. 44-505(a).]"

The next determination is whether respondent had a gross annual payroll of more than $20,000 in 2014. Respondent's records indicate it paid net wages of $10,974.04 to employees in 2014. That figure includes $705.92 paid to Goslin. It must be ascertained whether those individuals respondent labels contractors were contractors or employees.

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[12] The Preliminary Hearing Order cites several applicable cases concerning this issue.

This Board Member finds that Reed and Kelly were employees of respondent, not contractors. Both gentlemen testified they thought they were employees of respondent and were paid by the hour. Reed was paid 11 checks and Kelly was paid six checks. Reed indicated he was told where to go and what to do. Keehn was considered by Kelly

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[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[11] *Haney v. Chaney*, No. 104,063, 2011 WL 2205422 (Kansas Court of Appeals unpublished opinion filed on June 3, 2011).

[12] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102-03, 689 P.2d 787 (1984).

to be his boss. Reed and Kelly indicated they supervised other employees. Kelly was also reimbursed for expenses, which is an indication he was an employee, not a contractor.

The ALJ called into question Kelly's veracity because he reported no taxes for 2014. Keehn had similar issues. Under Keehn's ownership, respondent failed to pay withholding taxes to the State of Kansas, which makes his veracity equally questionable. Moreover, respondent's financial records were woefully inadequate.

This Board Member also finds Goslin was an employee of respondent. Goslin was paid four checks. While Keehn testified Goslin was an independent contractor, respondent's exhibit showed he was an employee. Goslin performed drywall installation and the evidence indicates respondent provided drywall installation services.

Little evidence was presented on the status of Taylor, Munoz and Woods. The testimony of Keehn that those three individuals were contractors is largely uncontroverted. Taylor was a painter hired to paint and was paid three checks. Munoz was hired to consult the repair or installation of a flat roof and was paid one check. Woods was hired as a welder on one project and also was paid one check. Therefore, this Board Member finds Taylor, Munoz and Woods were contractors, not respondent's employees.

Nothing in the record contradicts respondent's assertion that Baumgartner and Hernandez were not respondent's employees. Therefore, payments made to those gentlemen are not considered wages.

Claimant contends that the amounts withheld from his wages for rent should be included in respondent's annual gross wages. This Board Member finds claimant's testimony that he had $250 per month withheld from his wages credible. Claimant received his first check from respondent in October 2014 and testified he worked the early part of December. Giving claimant the benefit of the doubt, $750, or $250 each month was withheld from his wages in October, November and December 2014 and will be credited toward the $20,000 threshold.

After making the aforementioned findings, it is determined respondent paid the following net wages to its employees in 2014:

$10,974.04	respondent acknowledged was paid to employees, per respondent's records, including wages paid to Goslin
$ 750.00	rent withheld from claimant's wages
$ 4,793.24	paid to Reed
$ 2,670.16	paid to Kelly
$19,187.44	net wages respondent paid to employees in 2014

Claimant infers that in 2014, respondent had additional employees who were paid in cash and some of the employees it paid with checks were also paid in cash. Claimant

implies that if cash payments made to said employees are considered, respondent's gross annual payroll in 2014 exceeded $20,000. Keehn testified he paid employees with checks in 2014 and cash in 2015. Kelly's testimony somewhat disputes this as he worked for respondent in 2014 and said he was sometimes paid in cash. The burden of proof is on claimant to prove respondent had a gross annual payroll in 2014 exceeding $20,000. Claimant failed to prove what wages in cash, if any, respondent paid to employees in 2014.

At this juncture, claimant failed to prove respondent had a gross annual payroll of more than $20,000 in 2014. Claimant proved respondent paid net wages of $19,187.44 in 2014. Respondent's 2014 income tax return, its agreement with the Department of Labor or Revenue, and other records evidencing gross wages were never placed into evidence. Claimant failed to prove: (1) what additional employees worked for respondent and the amount of their gross wages, (2) the amount of wages respondent allegedly paid in cash to employees or (3) the taxes and any other amounts withheld by respondent from its employees' wages. It very well could be that if any of the foregoing were proven that respondent had a gross annual payroll of more than $20,000 in 2014.

The next issue is whether respondent reasonably expected its gross annual payroll not to be more than $20,000 in 2015. It is clear that at the beginning of 2015, Keehn intended for respondent to be a viable business. Respondent carried workers compensation insurance, which arguably indicates some intent to have a gross annual payroll of more than $20,000. Respondent hired claimant in 2015 and, according to claimant, several other employees. Claimant testified concerning Keehn's efforts to increase respondent's business. One can conclude that at the beginning of 2015, respondent reasonably expected to have a gross annual payroll of more than $20,000.

When Keehn testified at the preliminary hearing on August 19, 2015, it was equally clear respondent was no longer a viable business. Respondent let its insurance lapse due to nonpayment of premiums. At that time, it is highly likely that respondent reasonably estimated its 2015 gross annual payroll to be no more than $20,000.

Fetzer[13] provides guidance on this issue. Fetzer was injured on June 27, 1990. By the end of the second quarter of 1990, or June 30, Boling had paid $9,324.91 in gross wages to its employees in 1990. Boling argued that when an employer initially estimates its gross annual payroll will not exceed the threshold established in K.S.A. 44-505(a)(2), the employer does not come under the Act unless and until the gross payroll for the calendar year actually exceeds the threshold. The Kansas Court of Appeals noted the Legislature's intent is that the Act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the Act:

[13] *Fetzer v. Boling*, 19 Kan. App. 2d 264, 867 P.2d 1067 (1994).

> A liberal construction of K.S.A. 44-505(a)(2) (Ensley) to bring employees and employers within the Act requires the employer's estimate to be reasonable in both manner and method, *i.e., how* it is made; and time, *i.e., when* it is made. To construe the statute to permit a single estimate to be made at or before the beginning of a calendar year is a limiting and restrictive interpretation. On the other hand, to construe the statute to require the estimate to be made at "reasonable" times throughout the calendar year is more liberal and broadening and will have the effect of carrying out the legislative purpose of bringing employees and employers within the coverage of the Act. The requirement that the estimate be a "reasonable" one, both in terms of when and how it is made, allows a situation-specific evaluation which considers the particular circumstances of a given case. This will carry out the legislative purpose of bringing the employee and employer within coverage of the Act.[14]

Based on *Fetzer*, the date of claimant's accident is a reasonable time to estimate respondent's gross annual payroll for 2015. Claimant testified that as of May 27, his date of injury, he had been paid $4,000 in cash for his wages, including his rent. That is his net income. Respondent paid wages of $175 by check to Rach Wiley and Dary Child. Claimant indicated Campbell, Bill, Bob, Sam and Sam's cousin worked with him for respondent in 2015.

Although it is a close call, this Board Member finds that on claimant's date of injury by accident, respondent reasonably estimated its 2015 gross annual payroll to be no more than $20,000. That finding is based upon the limited evidence in the record. All that is known is that claimant was paid $4,000 in cash in 2015, Campbell was paid between $1,500 and $3,000 and other employees were paid $175. Campbell testified he was paid $18 per hour and supervised other employees of respondent. He indicated he completed a Form W-4 that he attempted to give Keehn. Those are factors supporting a finding that Campbell was an employee. Moreover, Campbell believed he was respondent's employee.

In conclusion, this Board Member finds:

1. In order for respondent not to be covered by the Act, respondent must have to have a gross annual payroll of not more than $20,000 for 2014 and reasonably estimated its gross annual payroll for 2015 to be no more than $20,000.

2. At this juncture, claimant failed to prove respondent had a gross annual payroll of more than $20,000 for 2014 and reasonably estimated its gross annual payroll for 2015 to be more than $20,000.

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[14] *Id.* at 268-69.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[16]

WHEREFORE, the undersigned Board Member affirms the May 12, 2016, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of July, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Rebecca Sanders, Administrative Law Judge

[15] K.S.A. 2015 Supp. 44-534a.

[16] K.S.A. 2015 Supp. 44-555c(j).